Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah binti Haron

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–223 OF 2004
MOHD HISHAMUDIN J
31 JANUARY 2008

Civil Procedure — Jurisdiction — Syariah Court — Husband deposited money into wife's account — Breakdown of marriage — Husband filed an application at Syariah Court to determine validity of marriage and a civil suit at High Court for declaration that money deposited held on trust — Whether matter Syariah Court jurisdictionally incompetent to decide

Islamic Law — Jurisdiction — High Court — Husband deposited money into wife's account — Whether it was held on trust — Whether money was gift under Islamic law — Whether matter Syariah Court jurisdictionally incompetent to decide

This was the defendant's appeal against the decision of the learned senior assistant registrar who had dismissed her application to strike out the plaintiff's statement of claim pursuant to O 18 r 19(1) of the Rules of the High Court 1980. The plaintiff and defendant were husband and wife. Some time in 1999 the plaintiff had deposited a sum of USD50,000 into the defendant's account at the Bank of Hawaii in the United States. It was averred by the plaintiff that the defendant was to hold the money on trust for the plaintiff. In June 2003 the marriage between the plaintiff and the defendant broke down and the plaintiff filed an application at the Syariah Court to determine the validity of the marriage under the Selangor Muslim Family Enactment of 1984. In this writ action, the plaintiff/husband sought, among others, a declaration to the effect that the USD50,000 was held by the defendant/wife on trust for his benefit. However, the defendant argued that the subject matter of the dispute fell under the jurisdiction of the Syariah Court.

Held, dismissing the appeal with costs:

(1) The nature of the subject matter of the dispute between the parties concerned the law of trust. Disputes concerning the law of trust comes

within the jurisdiction of this court to determine (see item 4(e)(i) ('equity and trust') of the Federal List (List I) of the Ninth Schedule of the Federal Constitution). It thus followed that any dispute pertaining to the law of trust was outside the jurisdiction of the Syariah Court (see paras 6–7).

(2) As the dispute between the parties revolved around a specific sum of money — the USD50,000 — it did not make sense that the issue concerning the law of trust be decided by this court and that the issue concerning the law of gift under Islamic law be decided by the Syariah Court. Although the issues were different, they were not severable because the subject matter was the same — the USD50,000. Thus, the evidence that would be tendered by both sides would also be the same — no matter where the forum was (see para 10).

(3) Where there was an issue of competing jurisdiction between the civil court and the Syariah Court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah Courts as the High Court of Malaya and the High Court of Sabah and Sarawak were superior civil courts, being High Courts duly constituted under the Federal Constitution. Syariah Courts were mere state courts established by state law, and under the Federal Constitution these state courts did not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964 (see para 14).

(4) In the circumstances, this action must be tried and determined by this court, although it was foreseeable that at the trial the issue of gifts under the Islamic law would be raised by the defendant. However, in the event the issue was raised, this court would not decline jurisdiction to hear it but will proceed to hear and to make a finding or ruling on the issue. At the trial, the defendant may, if she so wishes, call an expert on Islamic law to prove that under Islamic law a valid gift had been made by the plaintiff to the defendant (see para 16).

[Bahasa Malaysia summary

Ini adalah rayuan defendan terhadap keputusan penolong kanan pendaftar yang bijaksana yang telah menolak permohonannya untuk membatalkan penyata tuntutan plaintif mengikut A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif dan defendan adalah suami dan isteri. Pada 1999 plaintif telah mendepositkan sejumlah USD50,000 ke akaun defendan dalam Bank of Hawaii di Amerika Syarikat. Ia ditegaskan oleh plaintif bahawa defendan sepatutnya memegang wang tersebut atas amanah untuk plaintif. Pada Jun 2003 perkahwinan di antara plaintif dan defendan mulai retak dan plaintif memfailkan satu permohonan di Mahkamah Syariah untuk

menentukan kesahihan perkahwinan tersebut di bawah Enakmen Keluarga Islam Selangor 1984. Di dalam tindakan writ ini, plaintif/suami menuntut, antara lain, satu deklarasi bahawa jumlah USD50,000 dipegang oleh defendan/isteri atas amanah untuknya. Walau bagaimanapun, defendan menyatakan bahawa perkara yang dipertikaikan tersebut terangkum di bawah bidang kuasa Mahkamah Syariah.

Diputuskan, menolak rayuan dengan kos:

(1) Sifat perkara pertikaian di antara pihak-pihak adalah berhubung dengan undang-undang amanah. Pertikaian-pertikaian berhubungan undang-undang amanah jatuh di bawah bidang kuasa mahkamah ini untuk diputuskan (lihat butiran 4(e)(i) ('ekuiti dan amanah') Senarai Persekutuan (Senarai I) Jadual Sembilan Perlembagaan Persekutuan). Dengan itu, sebarang pertikaian berhubungan dengan undang-undang amanah adalah di luar bidang kuasa Mahkamah Syariah (lihat perenggan 6–7).

(2) Oleh kerana pertikaian di antara pihak-pihak berkisar pada jumlah wang tertentu — USD50,000 — ia tidak masuk akal bahawa isu yang berhubung dengan undang-undang amanah diputuskan oleh mahkamah ini dan isu yang berhubung dengan undang-undang hadiah di bawah undang-undang Islam diputuskan di Mahkamah Syariah. Walaupun isu-isu tersebut adalah berbeza, ia tidak dapat diasingkan kerana perkara adalah sama — USD50,000 tersebut. Oleh itu, keterangan yang akan dikemukakan oleh kedua-dua pihak adalah sama — tidak kira forum yang mana (lihat perenggan 10).

(3) Di mana terdapat isu bidang kuasa yang bertentangan di antara mahkamah sivil dan Mahkamah Syariah, prosiding-prosiding di Mahkamah Tinggi Malaya atau Mahkamah Tinggi Sabah dan Sarawak mesti diberi keutamaan daripada Mahkamah Syariah kerana Mahkamah Tinggi Malaya dan Mahkamah Tinggi Sabah dan Sarawak adalah mahkamah sivil yang lebih tinggi kedudukannya sebagai Mahkamah Tinggi yang dibentuk di bawah Perlembagaan Persekutuan. Mahkamah-Mahkamah Syariah adalah hanya mahkamah negeri yang ditubuhkan oleh undang-undang negeri, dan di bawah Perlembagaan Persekutuan mahkamah-mahkamah negeri ini tidak menikmati status dan kuasa yang sama kerana Mahkamah Tinggi ditubuhkan di bawah Akta Mahkamah Kehakiman 1964 (lihat perenggan 14).

(4) Dalam keadaan ini, tindakan ini mesti dibicarakan dan diputuskan oleh mahkamah ini, walaupun ia boleh diramal semasa perbicaraan, isu hadiah di bawah undang-undang Islam akan dibangkitkan oleh defendan. Walau bagaimanapun, sekiranya isu tersebut dibangkitkan,

mahkamah ini tidak akan menolak bidang kuasa untuk mendengarnya tetapi terus mendengarnya dan membuat penemuan atau perintah atas isu tersebut. Semasa perbicaraan, defendan boleh, sekiranya beliau ingin, memanggil seorang pakar mengenai undang-undang Islam untuk membuktikan bahawa di bawah undang-undang Islam satu hadiah yang sah telah diberikan oleh plaintif kepada defendan (lihat perenggan 16).]

Notes

For a case on jurisdiction of the Syariah Court under civil procedure, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4618.

For cases on jurisdiction of the High Court under Islamic law, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 542–548.

Cases referred to

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101 (distd)

Legislation referred to

Courts of Judicature Act 1964

Federal Constitution arts 121, 121(1), 121(1A), Ninth Schedule, (Federal List) item 4(e)(i), (State List) item 1

Rules of the High Court 1980 O 18 r 19(1)

Dinesh Nair (How, Zul & Low) for the plaintiff.

SY Wang (Michael Chai & Co) for the defendant.

Mohd Hishamudin J:

ON ENCLOSURE 20

[1] Enclosure 20 is an appeal by the defendant against the decision of the learned senior assistant registrar who had dismissed the defendant's application to strike out the plaintiff's statement of claim pursuant to O 18 r 19(1) of the Rules of the High Court 1980.

[2] The basis of the defendant's application is that the subject matter of the dispute falls under the jurisdiction of the Syariah Court. I have dismissed this appeal with costs.

[3] The plaintiff and defendant are husband and wife. They were married in Jakarta. Some time in 1999 the plaintiff had deposited a sum of USD50,000 into the defendant's account at the Bank of Hawaii in the United States. It is averred by the plaintiff at para 8 of the statement of claim that the defendant was to hold the money on trust for the plaintiff. In June

A 2003 the marriage between the plaintiff and the defendant broke down and the defendant left the matrimonial home. The plaintiff filed an application at the Syariah Court at Shah Alam to determine the validity of the marriage under the Selangor Muslim Family Enactment of 1984.

B **[4]** In this writ action, the plaintiff/husband seeks, among other reliefs, a declaration from this court to the effect that the USD50,000 is held by the defendant/wife on trust for his benefit.

C **[5]** I am unable to accept the argument of the defendant that this court has no jurisdiction to hear the subject matter of the dispute, and that the subject matter of the dispute comes within the jurisdiction of the Syariah Court.

[6] It is clear to me that this court has the jurisdiction to hear the subject
D matter of the dispute. In determining the nature of the subject matter of the dispute between the parties I must have regard to the statement of claim. Based on the statement of claim the issues are:

(i) whether the defendant/wife held the USD50,000 on trust for the plaintiff/husband;

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(ii) whether the defendant/wife had committed a breach of trust when she refused to return the USD50,000 to the plaintiff/husband; and

(iii) whether the USD50,000 was, instead, a gift from the plaintiff/husband to the defendant/wife, as claimed by the latter.

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[7] Issues (1) and (2) above concern the law of trust. It appears not to be disputed that disputes concerning the law of trust comes within the jurisdiction of this court to determine (see item 4(e)(i)('equity and trust') of
G the Federal List (List I) of the Ninth Schedule of the Federal Constitution). Hence, it follows that any dispute pertaining to the law of trust is outside the jurisdiction of the Syariah Court.

[8] However, it is pointed out by learned counsel for the defendant/wife
H that the issue as to whether the USD50,000 was given by the plaintiff/husband to the defendant/wife as a gift is an issue which falls within the jurisdiction of the Syariah Court since both husband and wife are Muslims. The learned counsel for the defendant refers to para (ii)('gifts or succession') of item 4(e) of the Federal List (List I) and item 1 of the State List
I (List II) of the Ninth Schedule of the Federal Constitution.

[9] Now, accepting that the above propositions on jurisdiction are correct in law, still the present dispute cannot be taken out from this court and be transferred to the Syariah Court. This is because under the Federal

Constitution the Syariah Court has no jurisdiction to hear disputes pertaining to the law of trust. If I were to transfer this case to the Syariah Court for the Syariah Court to determine the issue pertaining to the gift, at the Syariah Court the plaintiff/husband will raise the issue that the money was given to the defendant/wife, not as a gift, but to be held on trust for his benefit. As this issue of the creation of a trust under the ordinary law (or civil law) is intertwined with the issue pertaining to the giving of a gift under Islamic law, the Syariah Court must also determine whether a trust was created — but then this is a matter which the Syariah Court is jurisdictionally incompetent to decide. So, where do we go from here?

[10] As the dispute between the parties revolves around a specific sum of money — the USD50,000 — it does not make sense to suggest that the issue concerning the law of trust be decided by this court and that the issue concerning the law of gift under Islamic law be decided by the Syariah Court (but to be fair to the defendant, her counsel makes no suggestion to this effect). It does not make sense because although the issues are different, they are, however, not severable; and they are not severable because the subject matter is the same: the USD50,000; and the evidence that will be tendered by both sides will also be the same — no matter where the forum is.

[11] By reason of the peculiarity of the present case, the question arises: which court is the appropriate court to hear the dispute? The Constitution, in particular art 121, unfortunately, is not clear on this issue. In a sense, it can be said here that there is a 'conflict' of jurisdiction between the ordinary courts and the Syariah Court. Hence it is left to this court to resolve this difficult issue.

[12] In the Federal Court case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, Abdul Hamid Mohamad FCJ (as he then was) said (at p 117):

> Until the problem is solved by the Legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the Syariah Court, the party raising the issue should file a case in the Syariah Court solely for the determination of that issue and the decision of the Syariah Court on that issue should then be applied by the civil suit in the determination of that case. But, this is only possible if both parties are Muslims. If one of the parties is not a Muslim such an application to the Syariah Court cannot be made. If the non-Muslim party is the would be plaintiff, he is unable even to commence proceedings in the Syariah Court. If the non-Muslim party is the would be defendant, he would not be able to appear to put up his defence. The problem persists. Similarly, if in a case in the Syariah Court, a civil law issue eg land law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the Syariah Court in deciding the case.

A **[13]** With respect I do not think the above ruling can be applied in all cases. Certainly it cannot be applied to the facts and issues of the present case where the issues are intertwined and it would be artificial or impractical to compartmentalise the issues as a civil court issue and as a Syariah Court issue and have them tried separately by different forums. For, the Syariah Court B issue (the 'gift' issue) inevitably would be raised by the defendant/wife in the civil court, if the case were to be tried in the civil court. Likewise, the civil court issue (the 'trust' issue) would inevitably be raised by the plaintiff/husband at the Syariah Court if the matter were to be tried by the Syariah Court. Although the issues are different, they are not severable and C they revolve around the same subject matter (the USD50,000) and on the same evidence (that would be tendered). Accordingly, I must regard the present case as an exception to the ruling made by Abdul Hamid Mohamad FCJ in *Latifah bte Mat Zin*. I propose not to decline jurisdiction to hear the case in full.

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[14] In my judgment, where there is an issue of competing jurisdiction between the civil court and the Syariah Court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah Courts as the High Court of Malaya and the E High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Syariah Courts are mere state courts established by state law, and under the Federal Constitution these state courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964. Indeed, the High F Courts have supervisory powers over Syariah Courts just as the High Courts have supervisory powers over other inferior tribunals like, for instance, the Industrial Court.

G **[15]** Of course, I am constantly conscious of (and, perhaps, troubled by) cll (1) and (1A) of art 121 of the Federal Constitution. But these provisions cannot be interpreted literally or rigidly. At times common sense must prevail. In interpreting them the purposive approach must be adopted.

H **[16]** In conclusion, this court has the jurisdiction to hear this case because the issue relating the law of trust is clearly within the jurisdiction of this court. This action must be tried and determined by this court, although it is foreseeable that at the trial the issue of gifts under Islamic law would be raised by the defendant. In the event that the issue is raised, this court will not I decline jurisdiction to hear it but will proceed to hear and to make a finding

or ruling on the issue. At the trial, the defendant may, if she so wishes, call an expert on Islamic law to prove that under Islamic law a valid gift had been made by the plaintiff to the defendant.

Appeal dismissed with costs.

Reported by Sally Kee